Supreme Court, U.S.
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No. 95-1989

In The

Supreme Court of the United States

October Term, 1995

JORGE SOTO,

Petitioner,

v.

IRENA LEBEDEVA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Virginia Long-Arm Statute is unconstitutional.

TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of the Case 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES CITED:

Early v. Travel Leisure Concepts, 669 F.Supp. 130 (E.D. Va. 1987) 3

English & Smith v. Metzger, 901 F.2d 36 (4th Cir. 1990) 3

Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652 (1950) 5

Nan Ya Plastics v. DeSantis, 377 S.E.2d 388 (Va. 1989) 3

Slaughter v. Commonwealth, 284 S.E.2d 824 (Va. 1981) 4

Virginia Lime Co. v. Craigsville Distrib. Co., 670 F.2d 1366 (4th Cir. 1982) 5

STATUTES CITED:

Va. Code Ann. § 8.01-428 2

Va. Code Ann. § 8.01-328 3

Va. Code Ann. § 8.01-329 ..... 4, 5

Va. Code Ann. § 46.2-324 5

STATEMENT OF THE CASE

Respondent points out to the Court the following perceived misstatements or omissions in the Petitioner's Statement of the Case. First, Petitioner has omitted from his Statement of Facts that there was a March 10, 1994, letter from Plaintiff's attorney to counsel for the insurance carrier of the Defendant. This March 10, 1994, letter explained that a phone call had been made to the Clerk's Office of the Fairfax County Circuit Court to ascertain that Service of Process on Mr. Soto was returned "Not Found." In addition to disclosing Mr. MacDonald how he may determine information in a Court file, the letter further stated, "I am asking for your agreement to accept service on behalf of Mr. Soto in order that we may proceed with the claim. I will allow you sufficient time to file your answer if you will agree to accept service." The second paragraph of that March 10, 1994, letter, also stated, "Please write and indicate your acceptance of service, or whether I will need to serve Mr. Soto through the Secretary of the Commonwealth."

Also, the Statement of Facts should include the argument presented to Judge Brown at the trial court level in which it was disclosed the Defendant had been in touch with his insurance company. The insurance company's adjuster been in contact with Mr. Soto. (See Record containing "Memorandum of Points and Authorities in Opposition to Motion to Set Aside Default Judgment", and argument presented before Circuit Court Judge Brown on June 16, 1995.)

Counsel for Soto was unwilling to disclose the whereabouts of Mr. Soto. This information was known to

counsel, but was not provided upon request because counsel felt that it was not proper to disclose this information. (See *Memorandum, supra,* Footnote Number 1, and transcript of June 16, 1995.)

ARGUMENT

Petitioner's argument is that because the Virginia Long-Arm Statute does not require actual proof of due diligence, that it violates constitutional standards. The Petitioner suggests in his brief that attorneys could use dishonest behavior, none of which is in the record of this case. The conduct of counsel was reviewed by two trial court judges, and the Supreme Court of Virginia. There is always a remedy for correcting a fraud committed upon the Court, in particular, in reference to a Default Judgement. Virginia Code Section 8.01-428, as amended, permits a court to set aside a judgment on default grounds if there has been fraud on the court, a void judgment, or proof of an accord and satisfaction. The trial court and the Virginia Supreme Court, after a review of the record, found that there was no such fraud on the court, as suggested by Petitioner.

Petitioner argues in his brief that he was not given the opportunity to be heard. This is incorrect as the record from the trial court below will substantiate. The Petitioner argues that the Virginia Long-Arm Statute is constitutionally invalid because he contends there is no notice which can reasonably be calculated to put the Defendant on notice. A review of the Virginia Long-Arm Statute, and the numerous Supreme Court of Virginia and

Fourth Circuit Court of Appeals cases interpreting it, all state otherwise.

When personal jurisdiction is sought pursuant to a Long-Arm Statute, a two-part analysis is generally employed: 1) whether asserting in personam jurisdiction over the defendant is contemplated by statute, and 2) if so, whether the assertion of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. *See e.g., English & Smith v. Metzger,* 901 F.2d 36, 38 (4th Cir. 1990); *Early v. Travel Leisure Concepts,* 669 F.Supp 130, 131 (E.D. Va. 1987); *Nan Ya Plastics v. DeSantis,* 377 S.E.2d 388, 391 (Va. 1989).

Under Virginia's Long-Arm Statute, personal jurisdiction may be asserted over a person as to a

> [c]lause of action arising from the person's: 1. Transacting any business in this Commonwealth; 2. Contracting to supply services or things in this Commonwealth; 3. Causing tortious injury by an act or omission in this Commonwealth; 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth . . .

Va. Code Ann. § 8.01-328.1(A) (Michie 1992).

In the present case, the Defendant, Mr. Soto, caused an automobile accident in Fairfax County, Virginia. This act clearly placed him within the jurisdiction of the Commonwealth of Virginia.

The issue in this case is one of notice. Jurisdiction does not attach to a defendant until process is served in a manner provided by statute. *Slaughter v. Commonwealth*, 284 S.E.2d 824, 826 (Va. 1981). In certain circumstances, service on a defendant can be made on the Secretary of the Commonwealth of Virginia, who is then the statutory agent of the person. *See* Va. Code Ann. § 8.01-329 (Michie 1992).

> [W]hen service is to be made on the Secretary, a party or his agent or attorney seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

Va. Code Ann. § 8.01-329(B).

> [S]ervice of process or notice on the Secretary may be made by mail if such service otherwise meets the requirements of this section. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith mailed, by the Secretary to the person or persons to be served at the last known post-office address of such person, and a certificate of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in this action. Service of process or notice on the

> Secretary shall be effective on the date the certificate of compliance is filed with the court in which the action is pending.

Va. Code Ann. § 8.01-329(C).

Constitutionally, a statutory method of notice is adequate if it is reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank*, 339 U.S. 306, 318, 70 S.Ct. 652, 659 (1950). With regard to the last known address, this requirement is satisfied when process is sent to the address where the parties regularly correspond by mail and a party serving process could reasonably expect process would reach that person. *See Virginia Lime Co. v. Craigsville Distrib. Co.*, 670 F.2d 1366, 1368 (4th Cir. 1982).

In the instant case, the last known address to which one could reasonably expect where Mr. Soto could be reached, would be the address that he had given to the Department of Motor Vehicles in Virginia. Since Mr. Soto was a licensed Virginia driver, he was required to give the Virginia Department of Motor Vehicles notification of any address change.[1]

Additionally, sending notice to the address on one's license, as well as the address Mr. Soto gave the investigating police officer on the scene, could be reasonably calculated to reach the Defendant because if he has moved, one could reasonably expect that a responsible

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[1] Virginia Code Section 46.2-324 requires, "Whenever any person, after applying for or obtaining a driver's license shall move from the address shown in the application or on the license, he shall, within thirty days, notify the Department in writing of his change of address . . . "

person would not only advise the Department of Motor Vehicles of the change of address, but the Postmaster, with a forwarding address which would cause the letter to then be mailed to the new address.[2]

In the instant case, not only was the reasonably calculated method of notice given to Mr. Soto, but both the adjuster for the insurance company that was responsible for the liability of Mr. Soto, as well as his attorney, were provided notification of the filing of the Motion for Judgment. Furthermore, the attorney for Mr. Soto had been advised that if he was unwilling to accept service for Mr. Soto, then notice would be given by and through the Secretary of the Commonwealth by using the Virginia Long-Arm Statute. The March 10, 1994, letter addressed to this attorney forewarned that occurrence. Therefore, not only did the Defendant have Long-Arm statutory notice by way of mailing to his last known address, he was given other notice by correspondence and telephone to his attorney.[3]

Counsel for Petitioner delves outside of the record of this case in suggesting that there was some inappropriate conduct when he refers to possibilities and matters that

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[2] Petitioner believes that the Defendant can commit a tort in Virginia, leave without giving a forwarding address, or abscond, or "disappear" and thereby avoid service.

[3] Because the Virginia Long-Arm Statute does provide an adequate method for notification, there is no need to analyze whether the notice to the Defendant's attorney could be imputed to the Defendant.

were never before the trial court, and were not part of the record in this case.[4]

In summary, Petitioner had adequate remedies available to challenge the notification requirement. The Virginia Long-Arm Statute does not violate due process because it does contain a statutory method of notice that is reasonably calculated to reach interested parties.

CONCLUSION

The Virginia Supreme Court, after review of a Petition for a Writ of Error, and upon a Petition of Rehearing before that Court, appropriately denied the appeal of the Petitioner.

For the foregoing reasons, the Petitioner's Petition for Writ of Error should be denied.

Respectfully submitted,

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[4] Regrettably, Petitioner has referred to a matter totally outside the record. The irrelevant matter contained in Footnote Number 1 of the Petition for Writ of Certiorari, at Pages 9-10 of Petitioner's Brief, has no place in a Petition addressed to the Supreme Court of the United States.